Supreme Court, U.S.
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No. 90-57

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES FIDELITY AND GUARANTY COMPANY
and
LEWIS O. FUNKHOUSER, Petitioners

vs.

ST. JOHN MORTGAGE COMPANY, INC., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, ST. JOHN MORTGAGE COMPANY, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 3, 1990

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly applied prior decisions of this Court involving summary judgment.

2. Whether the Court of Appeals correctly identified genuine issues of material fact, predicated on legal theories, which can only be resolved at trial.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all the parties to the proceeding in the United States Court of Appeals for the Third Circuit.

STATEMENT PURSUANT TO RULE 29.1

Respondent St. John Mortgage Company, Inc. has no parent company and no subsidiaries other than wholly-owned subsidiaries.

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BRIEF FOR RESPONDENT, ST. JOHN MORTGAGE COMPANY, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, St. John Mortgage Company, Inc. ("St. John"), respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit which reversed the district court's order granting a motion for summary judgment that was filed by Petitioners United States Fidelity and Guaranty Company ("USF&G") and Lewis O. Funkhouser ("Funkhouser").

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, for which USF&G and Funkhouser seek review, is reported at 897 F.2d 1266 (3rd Cir. 1990).

JURISDICTION

The decision of the Court of Appeals, which reversed the district court's entry of summary judgment, was entered on March 13, 1990. A petition for rehearing and rehearing in banc was denied on April 5, 1990. The Petition for a Writ of Certiorari was filed on July 5, 1990. The jurisdiction of this Court to review the decision of the Court of Appeals is invoked under 28 U.S. §1254(1).

RULES INVOLVED

The provisions at issue in this case are Federal Rules of Civil Procedure 56(c) and (e), the pertinent parts of which are set forth in the Petition at page 2. The entire text of Rule 56 is set out in the Appendix to the Petition at 36a.

STATEMENT OF THE CASE

This is an action for breach of an oral contract that was brought by Respondent St. John against Petitioners USF&G and Funkhouser.[1] This case involves an issue of first impression under Pennsylvania law—whether a commercial transaction that was to be documented, in part, with a bond and a bond purchase agreement, constitutes a "loan" or a "sale" under 13 Pa.C.S.A. §1206.

The conceded provisions of the oral agreement were as

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1. St. John instituted suit on July 23, 1987 in the United States District Court for the Eastern District of Pennsylvania. The subject matter jurisdiction of the district court was based on diversity of citizenship pursuant to 28 U.S.C. §1332.

follows.[2] USF&G was to lend $12 million to a wholly-owned subsidiary of St. John. The proceeds of this loan, along with a separate mortgage loan from another entity, were to be used to purchase certain parcels of real estate. St. John's subsidiary was to repay to USF&G the $12 million principal, with interest at the rate of 17.125%, over a ten-year period. To secure payment of the loan, a guarantee and pledge agreement was to provide that in the event of a default, USF&G would receive all the stock of St. John's wholly-owned subsidiary. At the end of the ten-year period, USF&G was to receive either a certain percentage of the proceeds of the sale or refinancing of the properties or of their appraisal value.

In answer to St. John's complaint, USF&G and Funkhouser generally denied that there was an agreement and denied its alleged terms. In addition, they alleged as an affirmative defense that the oral agreement was barred by the statute of frauds.[3]

After discovery, Petitioners moved for summary judgment in the district court. In their motion, they conceded the factual terms of the oral agreement.[4] Petitioners claimed that, despite the terms of the oral contract, it could not be enforced because it was barred by Pennsylvania's statutes of frauds. Petitioners' summary judgment motion was based on Penn-

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2. The terms of the oral agreement are set forth in the Court of Appeals' opinion below, *St. John Mortgage Co. v. United States Fidelity and Guaranty Co.*, 897 F.2d 1266, 1268 (3rd Cir. 1990).

Petitioners have omitted the provisions of the oral agreement from the statement of the case set forth in their Petition. A description of the oral agreement is necessary to understand the issues before the Court of Appeals which were raised by the summary judgment motion.

3. Rule 8(c) of the Federal Rules of Civil Procedure provides that the statute of frauds is an affirmative defense.

4. Petitioners have omitted to state in their Petition that they conceded the provisions of the oral agreement. This concession has a bearing on whether certiorari should be granted. The Court of Appeals accepted the concession. *St. John Mortgage Co.*, 897 F.2d at 1268, n. 1.

sylvania's real estate statute of frauds, 33 Pa.C.S.A. §1,[5] and Pennsylvania's version of the Uniform Commercial Code's statute of frauds prohibiting enforcement of an oral "contract for the sale of personal property," 13 Pa.C.S.A. §1206. Petitioners argued that the oral agreement was for the sale of a bond, which constituted the sale of "personal property." Since the contract was not reduced to a writing, it was allegedly barred by 13 Pa.C.S.A. §1206.

St. John opposed the motion for summary judgment in the district court. It claimed that there was a genuine issue of material fact as to whether the oral agreement constituted a loan transaction or a sale. In opposing the motion, St. John did not merely rely on the allegations of its complaint. It submitted deposition testimony, documents marked as deposition exhibits and an affidavit of its principal to demonstrate that the agreement could be construed as a loan. St. John also claimed that, as a matter of law, the agreement had to be viewed in its entirety to determine whether it was a loan or a sale.[6]

The district court entered summary judgment in favor of USF&G and Funkhouser on the grounds that the agreement constituted a sale of a bond; and, therefore, it was unenforceable under 13 Pa.C.S.A. §1206. St. John appealed the decision.

On appeal, the Court of Appeals' review of the district court's entry of summary judgment was plenary.[7] The entire

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5. The Court of Appeals held that the oral agreement did not involve an interest in land and that the real estate statute of frauds did not bar enforcement of the oral agreement. *St. John Mortgage*, 897 F.2d at 1270-71. Petitioners do not seek review of this aspect of the Court of Appeals' holding.

6. Contrary to the assertion at pages 4-5 of the Petition, St. John set forth the material facts in dispute and cited the appropriate law in opposing summary judgment before the district court. A further description of the district court proceedings would be inappropriate in opposing the Petition, since what transpired before the Court of Appeals is at issue here.

7. *Childers v. Joseph*, 842 F.2d 689, 693 (3rd Cir. 1988); *Equimark Commercial Financial Company v. C.I.T. Financial Services Corporation*,

record that was before the district court was placed before the Court of Appeals. In appealing the summary judgment, St. John did not rely on general allegations in the complaint. It submitted, for the court's review, deposition testimony and documentary exhibits, which included the testimony of and correspondence from St. John's counsel, Richard Sabat, Esquire ("Sabat"), who had represented St. John in connection with the transaction. St. John argued that the district court's judgment should have been reversed for the following reasons. It claimed that, as a matter of law, the oral agreement was not a sale of personal property within 13 Pa.C.S.A. §1206. Although this was a matter of first impression under Pennsylvania law, St. John cited cases, in its brief to the Court of Appeals,[8] which had considered the issue of what constitutes a "sale" under section 1206 and other sections of Pennsylvania's version of the Uniform Commercial Code.[9] St. John claimed that under the guidelines of these cases, the conceded terms of the oral agreement did not render the transaction a "sale."

St. John also argued that, in construing the oral agreement, the Court had to use the standard it had enunciated in an earlier case[10] of viewing the "reasonable totality of the circumstances" to determine whether the transaction was a "sale."[11] St. John additionally relied on a Pennsylvania case which, although not a Uniform Commercial Code case, was

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812 F.2d 141, 142 (3rd Cir. 1987); *Maldonado v. Ramirez*, 757 F.2d 48, 49 (3rd Cir. 1985).

8. Petitioners have misstated that St. John cited no law in its brief to assist the Court in defining the difference between a loan or a sale. Petition, p. 4.

9. St. John cited the following cases: *Hiller v. Franklin Mint, Inc.*, 485 F.2d 48 (3rd Cir.), *cert. denied*, 416 U.S. 992 (1973); *Baldassarre v. Rare Metal Derivatives, Inc.*, 444 Pa. 100, 282 A.2d 262 (1971); *Simcoe v. Huiszar*, 10 Pa. D. & C.3rd 298 (Carbon County 1978).

10. In this regard, St. John cited the following case to the Court of Appeals: *DeFillippo v. Ford Motor Company*, 516 F.2d 1313 (3rd Cir. 1975).

11. 516 F.2d at 1323.

applicable to the issue of determining whether the transaction was a "loan" or a "sale."[12]

In addition to arguing that the oral agreement could not be barred as a matter of law under 13 Pa.C.S.A. §1206, St. John also claimed that the district court erred because it disregarded evidence presented by St. John which demonstrated that there was a genuine issue of material fact as to whether there was a "loan" or "sales" transaction. The district court had concluded that "[t]here was no evidence in the record that the contemplated agreement was anything other than for the sale of a bond. . . ." (Petition, App. 22a). This finding ignored testimony and documents presented by St. John.

St. John claimed that before the application of section 1206 could be decided, the primary, material issue to be decided was factual—was there to be a "loan" or a "sale." St. John, in its brief to the Court of Appeals, referred to Pennsylvania cases which hold that in the case of an oral contract, it is the exclusive function of the jury to determine the meaning of the agreement and the understanding of the parties in light of the surrounding circumstances.[13] Since the terms of the agreement were conceded by USF&G and Funkhouser, the meaning of the agreement and the understanding of the parties were the only facts in issue. Relying on this Court's holding in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), St. John contended that the district court erred in concluding that there was an absence of a genuine issue of

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12. St. John cited *Equitable Credit Co. v. Stephany*, 115 Pa.Super. 261, 38 A.2d 412 (1944), where the court disregarded a bill of sale to determine that a transaction was a loan and emphasized that one must analyze the nature of the transaction and the relationship between the parties.

13. In this regard, St. John cited the following cases: *Lucacher v. Kerson*, 355 Pa. 79, 48 A.2d 857 (1946); *Knauer v. Knauer*, 323 Pa.Super. 206, 470 A.2d 553 (1983); *Kirk v. Brentwood Manor Homes, Inc.*, 191 Pa.Super. 488, 159 A.2d 48 (1960); *Solomon V. Luria*, 45 Pa. D. & C.2d 291 (1967), *aff'd.*, 231 Pa.Super. 87, 246 A.2d 435 (1968).

material fact as to whether the oral agreement constituted a "loan" or a "sale."[14]

The Court of Appeals accepted St. John's argument regarding the existence of a genuine issue of material fact as to whether a sale or a loan was the subject of the oral agreement. On March 13, 1990, the Court of Appeals entered its decision reversing the district court's entry of summary judgment against St. John. The Court of Appeals held that the "district court erred in holding that the alleged oral agreement was, as a matter of law, a contract for the sale of a bond." 897 F.2d at 1271. The Court of Appeals found that a genuine issue of material fact existed as to whether the alleged agreement was a loan or a sale. *Id.* at 1269, 1270.

The Court looked at the evidence before it and concluded that a material factual dispute existed. In this regard, it stated:

> [t]here is evidence which indicates that the real substance of the transaction may have been merely an agreement to make a loan, and the 'bond' language may have been used by the parties for some other purpose.
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> * * *
>
> [T]he record indicates that the substance of the transaction may have been more than the mere sale of a bond. . . . [I]n a letter describing the transaction, Sabat . . . explained that the transaction would require extensive documentation. . . . Many more documents than the Bond Purchase Agreement would have been required to close the transaction.

897 F.2d at 1269.

Thus, the Court of Appeals concluded that the district court "focused too narrowly in confining its analysis to the

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14. The Petitioners have misstated that St. John did not point to any factual dispute before the Court. Petition, p. 5.

bond rather than the overall transaction." *Id.* at 1270. The judgment of the district court was reversed, and the case remanded for further proceedings consistent with this holding.[15]

SUMMARY OF THE ARGUMENT

The issues raised by Petitioners USF&G and Funkhouser are not appropriate for review because a unanimous Third Circuit Court of Appeals correctly resolved them, and its opinion is not in conflict with decisions of this or other courts.

In reviewing the district court's entry of summary judgment, the Court of Appeals correctly applied the principles governing summary judgment as set forth in recent decisions of this Court. The application of those principles is not inconsistent with decisions by other Courts of Appeals. The Court made a plenary review of all the evidence submitted by Respondent St. John and the Petitioners, and it considered the legal authority explaining the distinction between a sale and a loan. The Court did not err in concluding that a genuine issue of material fact existed as to whether the oral agreement should be deemed a loan or a sale of a bond.

The Court's finding did not rest on any general allegations made by St. John. It was based on conflicting evidence which had been properly placed before the Court and which was duly considered by it. The material fact was sufficiently identified by the Court as a dispute involving the appropriate characterization of the transaction as a loan or a sale. There were no other specific facts in dispute because USF&G and Funkhouser conceded the facts concerning the actual terms of the agreement.

The Court's opinion clearly identifies the factual dispute

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15. Petitioners have egregiously misstated the holding of the Court of Appeals. Contrary to their assertions, the Court of Appeals *did* identify facts which could be resolved on remand. Furthermore, neither the Court nor St. John relied on "general allegations" that the transaction was a loan and not the sale of a bond. Petition, p. 5.

that must be resolved on remand to the district court—was the oral agreement a sale or a loan. In resolving this dispute, the Court has instructed that the substance of the agreement must be considered. The opinion defines the substance of the agreement as the terms of the agreement. Consistent with the Court's opinion, the following facts must be established at trial. St. John will have to prove that an oral agreement was made. It will have to prove its terms and that the agreement was a loan.

In defining the material fact in dispute, the Court considered the legal authority cited by St. John. More significantly, Petitioners themselves raised the factual dispute regarding the loan or sale controversy by raising the statute of frauds, 13 Pa.C.S.A. §1206, as an affirmative defense. St. John satisfied its burden of demonstrating that there was a genuine issue for trial and that the Petitioners were not entitled to a judgment in their favor, as a matter of law.

ARGUMENT

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Correctly Applied Prior Decisions of This Court Involving Summary Judgment.

Petitioners claim that their Petition should be granted because the Court of Appeals decision is in conflict with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Lujan v. National Wildlife Federation*, No. 89-640, 58 U.S.L.W. 5077 (June 27, 1990). They contend that the Court of Appeals applied an erroneous burden of proof. This argument is simply without any merit.

First, Petitioners have omitted to state in their petition that St. John, in opposing summary judgment, cited both *Anderson v. Liberty Lobby, Inc.* and *Celotex Corp. v. Catrett* in its brief to the Court of Appeals. They have also omitted to state that *Lujan v. National Wildlife Federation* was not even

decided at the time that the Court of Appeals entered its decision; and, therefore, that case has no bearing on this one.[16]

In *Anderson v. Liberty Lobby, Inc.* and *Celotex Corp. v. Catrett*, this Court clearly explained the appropriate burdens of proof that must be met by the movant and the opponent on a summary judgment motion, and this Court clearly defined the function of a trial court when considering summary judgment.

The initial burden is on the movant to show that there is no genuine issue of fact. As explained in *Celotex Corp. v. Catrett*:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.
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> * * *
>
> [T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.

477 U.S. at 323, 325; *Accord*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250, 256.[17]

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16. The Court of Appeals decision was entered on March 13, 1990 and a Rehearing and Rehearing In Banc was denied on April 5, 1990. *Lujan v. National Wildlife Federation* was decided on June 27, 1990. In any event, that decision does not overturn nor conflict with *Anderson v. Liberty Lobby, Inc.* or *Celotex Corp. v. Catrett*. In fact, *Lujan* cites *Celotex Corp. v. Catrett* with approval. 58 U.S.L.W. at 5081.

17. Petitioners claim that St. John erroneously relied on *Gans v. Mundy*, 762 F.2d 338 (3rd Cir.), *cert. denied*, 474 U.S. 1010 (1985), in its brief and that that case is inconsistent with *Anderson* and *Celotex*. That assertion is unfounded. St. John did not rely on *Gans* alone. Furthermore, the *Gans* allocation of the burden of proof is consistent with *Anderson* and *Celotex*.

The burden on the nonmoving party is to show sufficiently the existence of an element essential to that party's case and one on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. at 322-23. The adverse party must present specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby*, 477 U.S. at 249-50.

The function of the trial court in considering summary judgment was explained by this Court in *Anderson v. Liberty Lobby, Inc.* as to determine whether disputed issues of fact exist, and not to resolve factual issues. 477 U.S. at 249-50. In this regard, the Court stated:

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

477 U.S. at 250.

There is nothing in the Court of Appeals' decision which indicates that it failed to comply with the foregoing principles. There is nothing to indicate that it misallocated the burden of proof or that it improperly discharged its duty in considering the summary judgment motion. To the contrary, the decision reflects a close adherence to the holdings of *Anderson v. Liberty Lobby* and *Celotex Corp. v. Catrett*; and, the decision is also consistent with the subsequent opinion in *Lujan v. National Wildlife Federation*.

First, the Court of Appeals found that there was a genuine issue of material fact as to whether a loan or sale was contemplated. The finding was predicated on a review of evidence submitted by St. John. That evidence consisted of a letter from St. John's counsel, Sabat, which was marked at a deposition, Sabat's testimony and a checklist showing the large number of documents necessary to close the transaction. *St. John Mortgage Co. v. U.S. Fidelity and Guaranty Co.*, 897 F.2d at 1269. Furthermore, the Court considered the

substance of the transaction, i.e., the terms of the oral agreement, which Petitioners themselves conceded. *Id.*

The Court of Appeals' opinion reflects that St. John discharged its proper burden of proof. Unlike the nonmovant in *Lujan v. National Wildlife Federation*, St. John did not oppose summary judgment based on general allegations alone. It offered actual evidence to show a disputed issue of fact. Unlike the nonmovant in *Celotex Corp. v. Catrett*, St. John was not unable to produce actual evidence in support of its claim for a breach of an oral agreement. In fact, by conceding the terms of the oral agreement, Petitioners did not argue that St. John could not establish the existence of a contract. They simply argued, instead, that the agreement was unenforceable because of the statute of frauds, 13 Pa.C.S.A. §1206.

The Court of Appeals discharged its appropriate duty by determining that a factual dispute existed. Under the evidence presented, it would have been erroneous to resolve the factual issue in favor of any party. As the Court of Appeals properly concluded, that resolution can only be made by the trial court.

2. The Court of Appeals Correctly Identified Genuine Issues of Material Fact, Predicated on Legal Theories, Which Can Only Be Resolved at Trial.

Petitioners also claim that the Court of Appeals decision should be reviewed because St. John allegedly offered "no legal theory" identifying disputed material facts and allegedly failed to identify "any dispute about specific facts, the solution of which would enable the factfinder to conclude that respondent was entitled to prevail." Petition, pp. 7-8. These arguments are totally lacking any merit whatsoever. Petitioners have completely ignored and misstated: the proceedings below; the substance of the opinion for which they seek review; and the critical concession of specific facts which they made when moving for summary judgment.

a. *The Legal Theory*

St. John does not dispute that the substantive law of a case will identify which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248; *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Holloway v. Pigman*, 884 F.2d 365 (8th Cir. 1989); *A.I. Root Co. v. Computer Dynamics, Inc.*, 615 F.Supp. 727 (N.D. Ohio 1985), *aff'd.*, 806 F.2d 673 (6th Cir. 1986). St. John claims that the legal theories asserted by it and by Petitioners sufficiently shaped the one material fact before the Court—whether there was a loan or a sale.[18] The Court's opinion not only identifies that material fact, but it also reveals that it was cognizant of and applied the appropriate legal theories.

Petitioners themselves defined the material issue by affirmatively raising the statute of frauds, 13 Pa.C.S.A. §1206, on their motion for summary judgment. They placed in issue whether a loan or a sale was to occur by arguing that the transaction was barred by section 1206. Petitioners did not argue that there was no agreement. They did not dispute the specific terms of the agreement. They conceded them! They did not argue that St. John could not prove a breach of contract claim. Instead, Petitioners argued that, as a matter of law, the oral agreement was unenforceable because it was a sale of a bond which had to be in writing.

St. John, in its brief to the Court of Appeals, cited all the Pennsylvania law that existed, at the time, to assist the Court in determining whether a loan or sale occurred. *Supra*, pp. 5-6. There was no case under 13 Pa.C.S.A. §1206 directly on point. Thus, the issue was a novel one.

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18. It should be noted that the other significant issue before the Court was whether the transaction involved an interest in real estate, so as to be barred by the real estate statute of frauds, 33 Pa. C.S.A. §1. This issue was also resolved in favor of St. John. The Court applied the same principles of summary judgment. Since Petitioners do not seek review of this aspect of the opinion below, it is somewhat anomalous to argue, in effect, that the Court erred on one issue, but not the other.

St. John also argued to the Court of Appeals that, under Pennsylvania law, the meaning of an oral contract was an issue of fact for a jury to resolve, and St. John cited the appropriate legal authorities. *Supra*, p. 6. This predicate factual issue had to be resolved before a court could determine if section 1206 governed the oral contract at issue. St. John contended that, under *Anderson v. Liberty Lobby, Inc.*, the evidence showed a dispute regarding this material fact.

It is purely specious to allege that no legal theories were presented to the Court of Appeals to enable it to identify a material and disputed fact. In the first instance, Petitioners identified the crucial issue. St. John adequately relied on competent, existing legal authority to help refine that issue. It is indisputable that the Court of Appeals identified the material issue, the loan/sale dispute, and the theory supporting it. 13 Pa.C.S.A. §1206. 897 F.2d at 1268-1270.

b. *Specific Factual Dispute*

Petitioners also seek review of the Court of Appeals' decision on the grounds that the Court allegedly based its decision on general allegations, as opposed to specific facts, that the transaction was not a sale, and, that the decision, thus, should be reconsidered in light of *Lujan v. National Wildlife Federation*. Petitioners also claim that the decision is so defective that "no one yet knows what the trial is to be about." Petition, p. 9. Once again, this argument is baseless because it simply ignores the holding and findings of the Court of Appeals and the distinct singularity of the only factual issue raised by Petitioners on their motion.

In *Lujan v. National Wildlife Federation*, this Court held, *inter alia*, that when a defendant moves for summary judgment on the ground that a plaintiff has failed to establish a right to relief, the burden is on the plaintiff to set forth specific facts showing that there is an issue for trial. When no showing is made, the defendant is not entitled to judgment as a matter of law. This principle of law is neither novel, nor inconsistent with this Court's decision in *Anderson v. Liberty*

Lobby, Inc. or *Celotex Corp. v. Catrett*. In fact, in *Lujan*, this Court cited *Celotex* with approval in its holding. 58 U.S.L.W. at 5081. The Court in *Lujan* went on to find that the plaintiff's affidavit in that case was insufficient to prevent the entry of summary judgment because it merely repeated the allegations of the complaint.

Petitioners have attempted to bring this case within the facts of *Lujan*. However, that case is inapposite to this one for several reasons. First, it is indisputable that the Court of Appeals did not base its decision on general allegations. It considered evidence submitted by the parties. 897 F.2d at 1269-70. Second, there was only one material fact in issue, the loan or sale question. The specific facts involving the transaction, i.e., the actual terms or provisions of the oral agreement, were conceded by USF&G and Funkhouser. There simply was no dispute involving each element of the oral agreement. Petitioners moved for summary judgment, on the grounds that, as a matter of law, section 1206 barred enforcement. They chose not to controvert the individual elements of the agreement.

Finally, the general approach taken by the Court of Appeals is not only consistent with this Court's and other Courts of Appeals' application of summary judgment principles, but it is also appropriate in light of Pennsylvania law. The Court was cognizant of the undisputed specific facts of the oral agreement and concluded that the district court erred by not considering the "character" or "substance" of the entire transaction. 897 F.2d at 1268, 1269-70.

In light of the Court of Appeals decision, it is highly disingenuous for Petitioners to claim that no one knows what the trial will consist of. The ineluctable fact is that the jury will have to decide whether a loan or a sale occurred. Consistent with the Court of Appeals' decision, this is a question of fact which the jury will determine based on instructions from the court that they must consider the actual terms of the oral agreement in reaching their conclusion. St. John will, ob-

viously, have to prove that the oral agreement was actually entered into, and it will have to establish each of its terms.[19]

The summary judgment procedure set forth in Rule 56 was fully adhered to by the Court of Appeals and St. John. The Court of Appeals appropriately conducted a plenary review of the district court's decision. It allocated the proper burdens of proof for Petitioners and Respondent, and it performed its function, after reviewing all the evidence, of determining whether there was a genuine issue of material fact. There is simply no basis for this Court to review the decision.

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19. Petitioners' concession was made only for summary judgment purposes. 897 F.2d at 1268, n. 1.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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